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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 519

MARVIN HAYUTIN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 567

LEON NASH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 519, App. A; Pet. 567, App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1968. A petition for rehearing in No. 519 was denied on August 14, 1968, and the petition for a writ of

certiorari was filed on September 13, 1968. Mr. Justice Harlan extended the time for filing a petition for a writ of certiorari in No. 567 to and including September 27, 1968, and the petition was filed on September 26, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE INVOLVED

The pertinent statutes and rule are set out in the Appendix, *infra*, pp. 17–18.

QUESTIONS PRESENTED

In No. 519:

1. Whether the word "control" in Section 2(11) of the Securities Act of 1933 is unconstitutionally vague.

2. Whether the trial court erred in its rulings regarding the admissibility of evidence, the taking of a deposition, and the scope allowed government counsel on cross-examination.

In No. 567:

3. Whether petitioner was prejudiced by the trial court's failure to discharge the alternate jurors.

4. Whether the trial court erred in its instructions to the jury or coerced the jury to reach a verdict.

STATEMENT

Petitioners and others were indicted in the United States District Court for the Southern District of New York on numerous counts charging stock fraud and sale of unregistered securities (B.1–15).[1] The jury was un-

[1] "B." designates the government's appendix on the appeal of co-defendant Bilotti, and "H." the government's appendix on the

able to reach a verdict as to petitioner Hayutin. It found petitioner Nash guilty of conspiracy, using the mails to defraud by the sale of unregistered stock (two counts), and making fraudulent sales of stock (two counts), in violation of 18 U.S.C. 371 and Sections 5 and 17 of the Securities Act of 1933 (15 U.S.C. 77e and 77q). On February 20, 1967, petitioner Nash was sentenced to concurrent terms of imprisonment for a year and a day on each count and a fine of $500 (N. 4–5).

Petitioner Hayutin was subsequently retried before a jury and found guilty of conspiracy and of aiding and abetting the sale of unregistered stock (13 counts), in violation of 18 U.S.C. 371, 18 U.S.C. 2, and Section 5 of the Securities Act of 1933 (15 U.S.C. 77e). He was sentenced on May 5, 1967, to concurrent terms of two and a half years' imprisonment on each count and a fine of $14,000 (B. 1–15; R. 805). The cases were consolidated on appeal, and the court of appeals affirmed the convictions of both petitioners in a single opinion (See Pet. No. 567, App. A).

The evidence, which is detailed in the opinion of the court of appeals in this case (See Pet. 567, App. A 3–7, 14–15) and the companion *Bilotti* case (380 F. 2d 649, 651–652 (involving the trial at which Nash was convicted)), is not in dispute. In outline, it showed that in 1962 the organizers of Allied Enterprises of America (Breger and Blistein) were having difficulties in marketing Allied stock through a public

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appeal of petitioners Hayutin and Nash. We are filing both these volumes with the Clerk of the Court. Already lodged with the Clerk is petitioner Nash's appendix in the court of appeals ("N."), the certified record in No. 519 ("R.") and the trial transcript in No. 519 ("Tr.").

offering which had been exempted from the registration requirements of the Securities Act.[2] Breger and Blistein were introduced to petitioner Hayutin, who formulated and directed a plan, in which petitioner Nash participated, for the illegal marketing of large amounts of Allied shares without registration with the Securities and Exchange Commission. The execution of the scheme included, *inter alia,* the sale by Nash and another broker of about 12,000 shares in return for secret commissions (See Tr. 95–98, 101–103, 105–109, 111–112, 128–139, 1630, 1639–1641, 1645–1648, 1682–1692), artificial manipulation of the price of Allied stock, and illegal sales incident to Allied's acquisition of Tap Records, Inc., and American Stereophonic Corp., owned by one Miklos Gafni (see Tr. 114–116, 142–144, 162–163, 194–195, 1334–1336, 1649–1652). In one transaction arising out of this acquisition, Hayutin arranged for over 33,000 Allied shares to be placed in the name of a friend, co-defendant Schreiber, who had suffered some family misfortunes which enabled him, under Commission regulations, to dispose of the shares on the market without prior registration. Schreiber was to receive $10,000 for the use of his name, which he agreed to split with Hayutin (Tr. 194–195, 805–809). In order to justify Schreiber's apparent ownership of those shares, Hayutin prepared and backdated an agreement which evidenced a spurious sale by Schreiber to Tap Records of antique

[2] This was because the public offering was of 60,000 shares of Allied at $2.50 per share, and the aggregate offering price was less than $300,000 (See 15 U.S.C. 77c(b); 17 C.F.R. 230.251–263).

records in return for part ownership of Tap Records and consequently the right to receive the Allied shares (Tr. 194–195, 805–811, 820–821, 1361). The Schreiber shares were sold to the public through various brokers who received secret commissions (Tr. 251–254, 257, 1361–1362, 1384–1391). Additional Allied shares received by Gafni as a result of the merger were sold without registration as exempt shares through nominee arrangements devised by Hayutin (See Tr. 165–170, 197–202, 1345–1347, 1351, 1354–1356, 2601–2606, 2507–2508).

Within a few months, the cost of maintaining the fraudulent scheme became prohibitive because too many of the Allied shares which had been sold to the public were being resold to the brokers at the artificially high price maintained at the expense of Breger, who had agreed to repurchase such shares from the brokers (see Tr. 114–116, 142–144, 1649–1652). In order to relieve the pressure on the New York market, Hayutin and Schreiber flew to Germany in March 1963, where they arranged to sell Allied stock in Germany through co-indictee Fischer, director of a Munich bank, who would receive a kickback of approximately one dollar per share (Tr. 858–862, 869–873). Fischer thereafter sold some of the unregistered Schreiber shares in New York through reputable brokers (Tr. 269–270, 872–878, 939–940).

ARGUMENT

1. Read together, Sections 4 and 5(a) of the Securities Act prohibit the public offering of securities, in the absence of a registration statement, by "an issuer, underwriter, or dealer." An "underwriter" is defined

as one who offers or sells for an "issuer" or who has a direct or indirect participation in any such undertaking. An "issuer" includes "any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer" (Section 2(11), 15 U.S.C. 77b(11)).

Petitioner Hayutin argues (Pet. No. 519, pp. 10–16) that the undefined term "control" is impermissibly vague, and renders the criminal penalties unconstitutional.[3] As used in the Act, "control" is not a word of art but retains its common understanding of ability to direct management policies through ownership or power over voting securities. See 17 C.F.R. 230.405 (f); *United States* v. *Re,* 336 F. 2d 306, 316 (C.A. 2), certiorari denied, 379 U.S. 904; *Securities and Exchange Commission* v. *Culpepper,* 270 F. 2d 241, 245 n. 3 (C.A. 2); *United States* v. *Wolfson,* 269 F. Supp. 621, 625 (S.D.N.Y.). As the House Report pointed out: "The concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the act to become effective wherever the fact of control actually exists."[4]

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[3] The word "control stock" is not used in the Act. It is a short-hand expression for stock which is subject to registration when sold by an underwriter for an issuer who is in control.

[4] H. Rep. No. 85, 73rd Cong., 1st Sess., p. 14. Compare the explanation for using the similar phrase, "controlling influence" in the Public Utility Act of 1935: "The flexibility here provided is necessary in order that [T]itle I can meet the varied and subtle forms which corporate interrelationships have in the past and will in the future take." H. Rep. No. 1318, 74th Cong., 1st Sess., p. 9.

In the circumstances of this case, Hayutin's contention that the statute did not provide adequate notice is disingenuous. There is no dispute that Breger and Blistein were in actual control of Allied. They had founded the company, were its principal officeholders and stockholders, and supervised its operations. Hayutin obviously knew of the position of control of Breger and Blistein and he directed the entire scheme of unregistered sales with full notice that "control" stock was involved. See *United States* v. *National Dairy Corp.*, 372 U.S. 32–33; *Robinson* v. *United States*, 324 U.S. 282.

2. The trial court properly rejected petitioner Hayutin's offer of proof of alleged prior extra-judicial statements of government witnesses Schreiber and Gafni because defense counsel did not lay a foundation for such proof in cross-examination of the witnesses.[5] The tenor of the offers was that each witness had previously stated that he intended to place the blame for his own unlawful conduct upon Hayutin, who in fact was innocent.[6]

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[5] After the court had made its rulings, no attempt was made to place Schreiber back on the stand, and counsel stated that he was not going to go to the expense of bringing Gafni back from California to have him deny the conversation.

[6] The first offer was that defense witness Brenegan would testify that in March 1966, Schreiber had told him that "he wasn't worried about the Allied case because if the wors[t] came to wors[t], even though Hayutin had nothing to do with it, he was going to blame it on Hayutin." The court refused the offer on the ground that Schreiber had not been asked about the alleged conversation when he was on the stand (Tr. 2078–2080; Pet. App. F. 1–3).

The second offer was that defense witness Cumberland would testify that he had been seeking employment with government

Although defense counsel contended at trial that this testimony reflected a "counter conspiracy" against petitioner Hayutin (Pet. No. 519, App. F. 5), there was no attempt to show any plan or agreement between Schreiber and Gafni to place the blame on Hayutin. As the court of appeals held, there was sound reason for excluding proof of these alleged statements contradicting the witnesses' testimony and indicating bias or prejudice, where the defense refused first to confront the witnesses with them. *Smith* v. *United States,* 283 F. 2d 16 (C.A. 6); *Burton* v. *United States,* 175 F. 2d 960, 965 (C.A. 5), certiorari denied, 338 U.S. 909. Fairness to the witness requires that such a foundation be laid so that he may explain, clarify, or deny the statement attributed to him and thereby protect his own character and reputation. *Conrad* v. *Griffey,* 16 How. 38, 46; *Mattox* v. *United States,* 156 U.S. 237, 245–246.

3. Petitioner Hayutin argues that since his character witnesses had testified on direct examination only as to his reputation for truth and veracity, the trial

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witness Gafni and was talking to him some time in May 1963 in Hayutin's apartment, while Hayutin was out of the room. According to the offer, the following took place: "Gafni told him that there was some trouble about the Allied situation, that that's why he hadn't concluded his arrangements with him, that he was going to be out of the trouble very shortly because he was going to shift all of the blame to Marvin Hayutin and then the witness said to Gafni, 'Did Hayutin do anything wrong in the case?' And Gafni said, 'No, but he,' Hayutin, 'can take [care] of himself and I can't and therefore I am going to put the blame on him.'" There was an extended colloquy as to the admissibility of this evidence. The court refused the offer (Tr. 3135–3141; Pet. App. F. 3–7).

court erred in permitting government counsel on cross-examination to inquire as to petitioner's reputation for participating in transactions involving charges of stock fraud and sale of unregistered securities (Pet. 519, pp. 21–23). However, the trial court exercised a reasonable discretion in these matters, sustaining objections to some questions and overruling others (Tr. 2101–2104, 2108–2111, 2367). The questions the court permitted were relevant,[7] and the jury was properly instructed as to the limited purpose of the inquiry. See *United States* v. *Bilotti,* 380 F. 2d 649, 653–654 (C.A. 2), certiorari denied, 389 U.S. 944; *United States* v. *Giddins,* 273 F. 2d 843, 845 (C.A. 2), certiorari denied, 362 U.S. 971; cf. *Michelson* v. *United States,* 335 U.S. 469.

4. Hayutin challenges the trial court's ruling, on Hayutin's motion to take the deposition of Klaus Fischer,[8] that the deposition might be taken in Germany for use at trial on the conditions that Fischer would consent to produce his relevant books and records for inspection, to give the deposition under oath and to answer all relevant questions put to him by defense and government counsel, and that Hayutin would pay the expenses of government counsel's attendance at the deposition (see Pet. No. 519, App. G,

[7] The witnesses were thus asked about frauds and swindles in which Hayutin allegedly participated and about Hayutin's promotion of a company with an individual who recently had been convicted of securities fraud (Tr. 2102–2106, 2108–2111, 2390, 2828–2832).

[8] Fischer, who was named in count one of the indictment, had never been arrested and refused to come to the United States for trial.

15–16). Since it was Hayutin's contention that Fischer's deposition would absolve him of any part in the sale of Allied shares in Germany (Pet. No. 519, App. G, 3–9), it was certainly not unreasonable to require full exploration of that issue, including the examination of relevant bank documents under Fischer's control. The court acted properly in fixing conditions for the deposition of Fischer, whose geographical location gave him immunity from prosecution, which would tend to decrease the risk of perjury.[9] There was no abuse of discretion in these circumstances. See *United States* v. *Whiting,* 308 F. 2d 537 (C.A. 2), certiorari denied, 372 U.S. 909; *United States* v. *Broker,* 246 F. 2d 328 (C.A. 2), certiorari denied, 355 U.S. 847; *Heflin* v. *United States,* 223 F. 2d 371 (C.A. 5); *United States* v. *Kelly,* 349 F. 2d 720, 769–770 (C.A. 2), certiorari denied, 384 U.S. 947; *United States* v. *Soblen,* 203 F. Supp. 542, 568 (S.D. N.Y.), affirmed, 301 F. 2d 236 (C.A. 2), certiorari denied, 372 U.S. 944.

5. Petitioner Nash argues that the district court committed reversible error in failing to discharge the alternate jurors when the jury retired to consider its

[9] The purpose of the motion, of course, was to obtain Fischer's testimony for use at trial and not for discovery in preparation for trial. If Fischer had not been unavailable as a witness by reason of the indictment, Hayutin would have borne the expense of producing him at trial, and Fischer would have been subject to cross-examination by government counsel. Since the deposition was intended to obtain trial testimony, the district court properly exercised its discretion by imposing conditions which assured that the government would have an adequate opportunity to cross-examine and that the cost of producing Fischer for cross-examination would fall, as at trial, on Hayutin.

verdict. As the court of appeals held, however, the dispositive consideration is not whether the express provisions of Rule 24(c), F.R. Crim. P., were violated,[10] but whether petitioner was thereby prejudiced. The record refutes any claim of prejudice. At all times the three alternates were kept separate from the jury. They were given a separate room, and separate marshals were assigned to them with the obligation under oath of making sure that no one spoke to them. Marshals assigned to the regular jury took the same oath (N. 59–60). There is nothing to suggest that the marshals in any way failed to carry out their responsibilities (N. 59–60; Pet. No. 567, App. A 13). Cf. *United States* v. *Virginia Erection Corp.*, 335 F. 2d 868 (C.A. 4). Furthermore, this question is not likely to recur, since the court below made it quite clear that the district courts should adhere strictly to the discharge requirements of the Rule (Pet. No. 567, App. A 12).

6. There was no reversible error in the court's instructions, and the court did not coerce the jury in reaching a verdict.

a. Petitioner Nash argues that the *Allen*[11] instruction given in this case unduly emphasized the element of expense in a possible retrial.[12] In view of the com-

[10] The Rule provides in pertinent part: "An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict * * *".

[11] *Allen* v. *United States*, 164 U.S. 492.

[12] The portion of the instruction mentioning expense was as follows: "[Y]ou know that time and effort and expense have been devoted to presenting this case. You know also that if you are unable to reach a verdict that it possibly might have to be retried again at more expense by another jury who would be selected in the same way you have been selected." At the

plexity of the issues and the length of the trial, expense was a matter of particular moment to both parties. However, the instruction did not elaborate upon the subject or emphasize the expenses of the government alone, as in the cases cited by petitioner.[13] On the contrary, the mention of expense was quite brief and conformed to the language of approved instructions. *United States* v. *Kawakita*, 96 F. Supp. 824, 855–856 (S.D. Cal.), affirmed, 190 F. 2d 506, 527–528 (C.A. 9), affirmed, 343 U.S. 717, 744; *United States* v. *Rao*, 394 F. 2d 354, 355–356 (C.A. 2); *Benscoter* v. *United States*, 376 F. 2d 49, 50 (C.A. 10); *Elbel* v. *United States*, 364 F. 2d 127, 135 (C.A. 10), certiorari denied, 385 U.S. 1014; *Wright* v. *United States*, 175 F. 2d 384, 388 (C.A. 8), certiorari denied, 338 U.S. 873; *Boehm* v. *United States*, 123 F. 2d 791, 812 (C.A. 8), certiorari denied, 315 U.S. 800; *United States* v. *Bilotti*, 380 F. 2d 649, 654 (C.A. 2), certiorari denied, 389 U.S. 944; Mathes & Devitt, *Federal Jury Practice and Instructions*, § 15.16.

b. After a ten-week trial, the jury began deliberations on forty counts relating to seven defendants on June 23, at 4:30 p.m. (N. 60). On the third day of deliberations, Saturday, June 25, at 2:45 p.m., the court gave its *Allen* instruction (*supra*, p. 12; N. 73–76). At 8:40 p.m., the foreman sent a note to the court,

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same time, the court made it clear that it was not impatient with the jurors and was not trying to persuade them to relinquish their sincere beliefs as to the findings which the evidence would support (N. 73–76). Cf. *Jenkins* v. *United States*, 380 U.S. 445.

[13] *State* v. *Earsery*, 428 P. 2d 794 (Kans.), and *United States* v. *Smith*, 303 F. 2d 341 (C.A. 4).

stating that the jury would like to work later than usual that night, in the hope of reaching a verdict on most of the counts (B. 66). At 10:40 p.m., the jury sent another note, stating that they had reached unanimous decisions on twenty of the forty counts, but felt that they were permanently deadlocked on the remainder. In reply to the court's request for suggestions, petitioner Nash's counsel replied that he had no comment or suggestion to make (N. 79–80).

The trial judge then summoned the jurors and told them that, because of their progress, it might prove fruitful if they spent a little more time that evening, and that he would ask them to continue only for another half or three-quarters of an hour to see if they could reach a verdict on all or some additional counts (N. 80–81). At 11:35 p.m., the jurors returned and advised the court that they were in a worse impasse than before. The court then advised the jury that the agreed verdicts would be taken. Only after this direction had been given, did petitioner's counsel suggest that there should be further deliberation the next day (N. 81–83).

These facts refute petitioner Nash's claim of coercion. The trial judge did not keep the jury late on Saturday night on his own initiative, but did so only upon the written request of the jury. The court imposed no deadline, but suggested a time limitation of thirty or forty-five minutes so that the jury would not feel obligated to remain out longer. Finally, defense counsel, although requested, offered no suggestions concerning the proper procedures, but waited until the court had taken what seemed to be a fair

approach and then complained of the court's disposition. There was clearly no abuse of discretion in these circumstances. *Mills* v. *Tinsley,* 314 F. 2d 311, 313–314 (C.A. 10), certiorari denied, 374 U.S. 847; *United States* v. *Minieri,* 303 F. 2d 550, 555–556 (C.A. 2), certiorari denied, 371 U.S. 847.

c. Without objection, the trial court gave the following instruction to the jury (N. 57–58):

> In our law there is a presumption that unless and until determined by you to be outweighed by the evidence to the contrary, a witness speaks the truth. * * * You have the right and obligation to weigh their evidence upon such bases as behavior on the witness stand, their conduct, their relationship to the parties here, their possible bias or impartiality, the reasonableness of their statements under the surrounding circumstances, the strength or weakness of their recollections, their testimony in relation to other evidence in the case, how they may be affected by your verdict, any possible motivation to testify falsely, and the like.

In this insulating context, and particularly since petitioner Nash took the stand and contradicted the evidence against him, there could hardly have been prejudice in the "presumption" instruction of which Nash now complains. See *United States* v. *Bilotti,* 380 F. 2d 649, 655–656 (C.A. 2), certiorari denied, 389 U.S. 944. The further claim that the instruction as a whole permitted the jury to reject petitioner Nash's testimony "because he had an interest in the outcome of the case" (Pet. 567, p. 20) is, as the court below indicated, frivolous on its face (Pet. 567, App. A 11). Cf.

Reagan v. *United States*, 157 U.S. 310, 304–310; *United States* v. *Mahler*, 363 F. 2d 673, 678 (C.A. 2); *Taylor* v. *United States*, 390 F. 2d 278, 284 (C.A. 8).

d. At the conclusion of the government's evidence, the defendants made numerous motions for directed judgments of acquittal, which were sustained in part and denied in part. Without objection or exception by petitioner Nash or any other defendant, these rulings were explained to the jury so that they might be acquainted with the narrowing of the issues previously outlined to them. (N. 76–78). In the final charge, the jury was again told that these rulings were not to be taken as any indication of the guilt or innocence of any of the defendants (B. App. 17, 24). Manifestly there was no error in this procedure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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OCTOBER 1968.

APPENDIX

Section 5(a) of the Securities Act of 1933, 15 U.S.C. 77e(a), provides:

> Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—
>
> (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security through the use or medium of any prospectus or otherwise; or
>
> (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Section 4 of the Securities Act of 1933, 15 U.S.C. 77d provides in pertinent part:

> The provisions of section 5 shall not apply to—
>
> (1) transactions by any person other than an issuer, underwriter, or dealer.
>
> * * * * *

Section 2 of the Securities Act of 1933, 15 U.S.C. 77b, provides in pertinent part:

> When used in this title, unless the context otherwise requires—
>
> * * * * *
>
> (11) The term "underwriter" means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or

indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors' or sellers' commission. As used in this paragraph the term "issuer" shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), provides:

> It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Rule 405(f) of the Rules of the Securities and Exchange Commission, 17 C.F.R. 230.405(f), provides:

> The term "control" (including the term "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

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